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No. 83-117

In the Supreme Court of the United States

OCTOBER TERM, 198....

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, a corporation,
Petitioner,

v.

ELDON FAULKENBERRY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

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July, 1983

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QUESTION PRESENTED

Whether the Oklahoma Supreme Court violated the dictate of the United States Supreme Court mandate set forth in *Norfolk & Western Railway Co.* v. *Liepelt,* 444 U.S. 490, 100 S.Ct. 755, 62 L.Ed.2d 689 (1980), in upholding the refusal by the trial court of the proffered instruction dealing with the taxability of personal injury award under the Federal Employees Liability Act.

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 3

I. The Supreme Court of Oklahoma erred in failing to reverse judgment based upon the trial court's refusal of the proffered instruction contrary to the United States Supreme Court mandate 3

II. *Liepelt* was retroactive in its nature and applicable to this case 7

CONCLUSION 7

CERTIFICATE OF SERVICE follows Petition.

APPENDIX A:

Opinion of Oklahoma Supreme Court, filed March 15, 1983.

APPENDIX B:

Petition for Rehearing, filed March 25, 1983.

APPENDIX C:

Proffered Instruction of non-taxability of award not given by the court.

APPENDIX D:

Order of Oklahoma Supreme Court denying Petition for Rehearing, filed April 25, 1983.

TABLE OF AUTHORITIES

Cases	PAGE(s)
Dice v. *Akron, C.&Y.R. Co.*, 342 U.S. 359, 72 S.Ct. 312, 96 L.Ed. 398 (1951)	6
Domeracki v. *Humble Oil & Refining*, 443 F.2d 1245, *cert. den.*, 404 U.S. 883, 92 S.Ct. 212, 30 L.Ed.2d 165 (1971)	5
Faulkenberry v. *The Kansas City Southern Railway Co.*, Okl., 602 P.2d 203 (1979)	2, 4, 7
Gulf Offshore Co. v. *Mobil Oil Corporation*, 453 U.S. 473, 101 S.Ct. 2870, 69 L.Ed.2d 784 (1981)	7
Norfolk & Western Railway Co., v. *Liepelt*, 444 U.S. 490, 100 S.Ct. 755, 62 L.Ed.2d 689	3, 4, 6, 7
Ybarra v. *Burlington Northern, Inc.*, 689 F.2d 147 (1982)	7
United States Code	
45 U.S.C.A. §51	1, 2, 8
Miscellaneous	
Robert J. Norstrum, "Income Taxes and Personal Injury Awards," 19 Ohio St. Law Journal 212 (1958)	6

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ELDON FAULKENBERRY,
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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

COMES NOW the petitioner and defendant below, The Kansas City Southern Railway Company, and for its petition to this Honorable Court for a writ of certiorari to issue to the Supreme Court of the State of Oklahoma, submits the following:

An Opinion of the Supreme Court of the State of Oklahoma is attached as Appendix "A". There was no written opinion denying the Petition for Rehearing filed by the petitioner.

The judgment of the Supreme Court of the State of Oklahoma was entered on March 25, 1983. Timely petition for rehearing was denied by order on April 25, 1983, and this petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

This was an action initiated in LeFlore County, Oklahoma, by the respondent and plaintiff below, Eldon Faulkenberry, for damages arising out of an alleged on-the-job injury while working for this petitioner. The action was brought under the Federal Employees Liability Act.[1]

The case was tried in the District Court of LeFlore County, Oklahoma, in 1978, and a jury rendered a verdict in favor of the respondent/plaintiff and against this petitioner in the amount of $50,000.00.

The Supreme Court of the State of Oklahoma reversed and remanded that case for a new trial in 1979.[2]

From the above remand new trial was commenced on February 4, 1980, and concluded on February 8, 1980, in the District Court of LeFlore County, Oklahoma, in which the respondent/plaintiff won a jury verdict in the amount of $475,000.00, and with interest and costs judgment was entered against this petitioner in the amount of $655,500.00.

On the 19th day of February, 1980, petitioner filed with the District Court of LeFlore County, Oklahoma, a motion for new trial. Arguments were heard on said motion on February 26, 1980, at which time the court overruled petitioner's motion for new trial which alleged, among other things, that the petitioner was entitled to a new trial on the grounds that the District Court had refused an instruction proffered by the petitioner which stated in toto:

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[1] 45 U.S.C.A. §51.

[2] *Faulkenberry* v. *The Kansas City Southern Railway Co.*, Okl., 602 P.2d 203 (1979).

> "You are instructed if you find from all the evidence in this case that the plaintiff should be awarded damages against the defendant that plaintiff would not be required to pay any state or federal income taxes on such award, if any is made."

It must be noted that this Honorable Court, the Supreme Court of the United States, on the 19th day of February, 1980, issued the opinion in *Norfolk & Western Railway Co.* v. *Liepelt,* 444 U.S. 490, 100 S.Ct. 755, 62 L.Ed.2d 689.

In March of 1980, petitioner appealed to the Supreme Court of the State of Oklahoma, and on March 15, *1983,* the Supreme Court affirmed the verdict in judgment stating that the refusal to give the timely offered instruction, mandated by *Liepelt,* supra, did not mandate a reversal.

REASONS FOR GRANTING THE WRIT

I. THE SUPREME COURT OF OKLAHOMA ERRED IN FAILING TO REVERSE JUDGMENT BASED UPON THE TRIAL COURT'S REFUSAL OF THE PROFFERED INSTRUCTION CONTRARY TO THE UNITED STATES SUPREME COURT MANDATE.

This Court stated in unambiguous terms in the case of *Norfolk & Western Railway Co.* v. *Liepelt,* 444 U.S. 490, 100 S.Ct. 755, 62 L.Ed.2d 689 (1980), that:

> "We hold that it was error to refuse the requested instruction in this case. That instruction was brief and could be easily understood. It would not complicate the trial by making additional qualifying or supplemental instructions necessary. It would not be prejudicial to either party, but would merely eliminate an area of doubt or speculation that might have an improper impact on the computation of the amount of damages."

The Oklahoma Supreme Court for some reason has taken this as a determination to be made on a case by case analysis of evidence presented. In fact, the Supreme Court of the State of Oklahoma construes the above quote from *Liepelt*, supra, in the following manner:

> ". . . This does not mean that Liepelt requires a reversal in every such case if *no* instruction was given advising the jury that damages for loss of future wages are not subject to federal income taxation." *Faulkenberry* v. *The Kansas City Southern Railway Co.*, Oklahoma Supreme Court Docket No. 55,005, at page 3.

Further, on page 3 of the Oklahoma Supreme Court's Opinion, evidence presented by an economist during trial is cited wherein it was stated that plaintiff would lose earnings in the future of between $649,853 and $737,897. An important difference must be here noted between this case and the underlying facts in *Liepelt*, supra. *Liepelt* was a case wherein damages based upon wrongful death were sought. Therefore, if liability was proven, it could not be disputed by any of the parties as to whether or not the deceased employee and his family would not be making wages in the future that he otherwise would have made but for his death. This is an entirely different situation. Eldon Faulkenberry seeks damages for personal injury, and his evidence is that he, although alive, was permanently disabled due to a back injury and will never be able to work again. The petitioner, The Kansas City Southern Railway Company, strongly disputed the respondent's evidence that he was permanently disabled and contended that he was fully and completely able to work at the time of trial. Two neurosurgeons from the immediate area of

the respondent's residence, Drs. John Wideman and William Lockhart, testified at trial that petitioner is physically able to work.

Therefore, the Supreme Court of the State of Oklahoma has overlooked the basic problem finally faced in the recognition that this instruction should be given as in the case of *Liepelt*, supra. That problem is, that without the informative instruction, a jury may inflate the award based upon the erroneous assumption that an award in a personal injury (wrongful death) may be subject to state and federal income taxes. The Supreme Court of the United States correctly notes Judge Aldisert, when he wrote for the Third Circuit in *Domeracki* v. *Humble Oil & Refining*, 443 F.2d 1245, *cert. denied*, 404 U.S. 883, 92 S.Ct. 212, 30 L.Ed.2d 165 (1971):

> "We take judicial notice of the 'tax consciousness' of the American public. Yet, we also recognize, as did the court in *Dempsey* v. *Thompson*, 363 Mo. 339, 251 S.W.2d 42 (1952), that few members of the general public are aware of the special statutory exception for personal injury awards contained in the Internal Revenue Code.
>
> " '[T]here is always danger that todays tax conscious juries may assume (mistakenly of course) that the judgment will be taxable and therefore make their verdict big enough so that plaintiff would get what they think he deserves after the imaginary tax is taken out of it.' " (Footnote omitted)

The underlying reason for giving the requested instruction and its rationale was obvious to Justice Stevens as well as to Judge Aldisert. This simple instruction, neutral in nature, removes all doubt that jurors, faced with the day to

day realities of twenty percent (20%) to fifty percent (50%) tax brackets, could, with ignorance of the Internal Revenue Code, award damages disproportionate to what they believe the actual compensatory value of the damages and injury to be. Robert J. Norstrum in his article "Income Taxes and Personal Injury Awards," 19 Ohio State Law Journal 212 (1958), stated:

> ". . . in denying both requests (for a cautionary instruction) can possibly have the effect of giving the plaintiff his taxes twice: once when gross income is used as a measure of loss and once when the jury adds a sum to the award, otherwise properly determined, on the erroneous notion that this is needed to compensate for taxes due now."

This Court in *Liepelt*, supra, did not seem, by its language, to make the giving of this instruction discretionary, but that its submission is mandatory. The Oklahoma Supreme Court has fully misinterpreted the ruling of this Court in a matter solely federal in nature, *Norfolk & Western Railway Co.* v. *Liepelt*, supra, and seen fit to set up a standard applicable only in Oklahoma to cases tried under the Federal Employees Liability Act. As the Court is fully aware, the purpose of the Federal Employees Liability Act was to establish uniformity throughout the union with respect to railroads' financial responsibility to injuries to their employees, *Dice* v. *Akron, C.&Y.R. Co.*, 342 U.S. 359, 72 S.Ct. 312, 96 L.Ed. 398 (1951).

II. *LIEPELT* WAS RETROACTIVE IN ITS NATURE AND APPLICABLE TO THIS CASE.

Ever e Oklahoma Supreme Court acknowledged the applicability of *Liepelt*, supra, to the case at bar. As stated above, this was a matter in which between the time of the jury verdict and the time of argument on the motion for new trial, the decision in *Liepelt*, supra, was issued. However, the Supreme Court of the State of Oklahoma in its decision in this matter stated that *Liepelt*, supra, does govern the law of this case, *Faulkenberry*, supra. The United States Court of Appeals for the Eighth Circuit, in a post-*Liepelt* decision, acknowledged the retroactive effect of *Liepelt*, supra, and further, upheld the reasoning that it was error not to instruct the jury as to the non-taxability of any damage award. *Ybarra* v. *Burlington Northern, Inc.*, 689 F.2d 147 (1982). Further, Judge Logan of the United States Court of Appeals for the Tenth Circuit, in citing *Gulf Offshore Co.* v. *Mobil Oil Corporation*, 453 U.S. 473, 101 S.Ct. 2870, 69 L.Ed.2d 784 (1981), acknowledged the retroapplicability of the *Liepelt* decision and reversed and remanded the case for new trial based upon the trial court's failure to instruct according to the dictates of *Liepelt*, supra.

CONCLUSION

The petitioner in this case respectfully submits that the Supreme Court of the United States should review the decision issued in this matter by the Supreme Court of the State of Oklahoma which carves out a single state exception to the purpose of uniformity in federal damage instructions and awards for its own jurisdiction. *Liepelt*, supra, and the cases that follow it in Federal Employee

Liability Act cases, have been unambiguous in stating that the instruction there mandated is mandatory and the case has retroapplicability.

The review of this matter is not complicated. It requires only an acknowledgement by this Court that the law created by cases from the United States Supreme Court dealing with federal matters, such as the Federal Employees Liability Act, are mandatory and binding on state courts, and particularly, the Supreme Court of the State of Oklahoma, and that it is not the position of state courts to create state by state exceptions, for whatever reason motivated, to the mandates and purposes of 45 U.S.C.A. §51, *et seq.*

Respectfully submitted,

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Attorneys for Petitioner/Defendant, The Kansas City Southern Railway Company

July, 1983

CERTIFICATE OF SERVICE

This is to certify that I, Richard L. Keirsey, a member of the Bar of this Court, made service of the foregoing Petition for Writ of Certiorari by placing three (3) copies of the same in the United States Mail, postage fully prepaid, to Whit Pate, P.O. Box 785, Poteau, Oklahoma 74953, attorney for respondent/appellant, this ..... day of July, 1983.

All parties required to be served have been served.

.....

Richard L. Keirsey

APPENDIX A

[Filed March 15, 1983]

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

ELDON FAULKENBERRY, Appellee,	)	
v.	)	
	)	No. 55,005
THE KANSAS CITY SOUTHERN RAILWAY COMPANY, a corporation, Appellant.	)	

APPEAL FROM THE DISTRICT COURT, LEFLORE COUNTY
Robert E. Price, Judge

In an action under the Federal Employers' Liability Act for personal injuries in a railroad accident, the jury allowed the plaintiff-employee to avoid a prior $25,000.00 settlement release and awarded him $475,000.00 in damages.

AFFIRMED

Richard L. Keirsey, Esq.
Burton J. Johnson, Esq.
Looney, Nichols, Johnson & Hayes
Oklahoma City, Oklahoma — For Appellant

Whit Pate, Esq.
Poteau, Oklahoma — For Appellee

OPALA, J.:

In this action under the Federal Employers' Liability Act [FELA] the issues presented on appeal are: [1] Was there prejudicial error in failing to instruct the jury that damages for lost future wages are not subject to income tax liability? [2] Did the trial court err in failing to sustain Railroad's demurrer to the evidence? [3] Did the trial court's refusal to bifurcate the proceedings constitute reversible error? and [4] Was there prejudicial error in a

ruling that restricted the scope of cross-examination? We answer all four questions in the negative.

The action under review was brought by an employee against the Kansas City Southern Railway Company [Railroad] for disabling injuries received on the job. On appeal from judgment on jury verdict that found the employee's release subject to avoidance and awarded him $50,000.00, this court reversed the judgment and remanded the cause for a new trial on all the issues.[1] Upon retrial, the jury verdict again went against the Railroad and this time the employee was awarded $475,000.00. The instant appeal followed.

I.

The Railroad first submits that the trial court erred in not instructing the jury that damages for lost future wages are not subject to income tax liability. Its argument is rested on the U.S. Supreme Court's decision in *Norfolk & Western Railway Company* v. *Liepelt*[2] handed down one week after judgment came to be rendered in the instant case. *Liepelt* pronounced a new rule of law. It held that a FELA defendant was entitled, as a matter of federal law, to an instruction that damages award for lost future wages is not subject to federal income taxation.

Error in refusing to give the requested instruction is governed by federal law.[3] Questions dealing with damages that may be recovered in a FELA action are federal in character.[4]

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[1] Faulkenberry v. Kansas City Southern Ry. Co., Okl., 602 P.2d 203 [1979].

[2] 444 U.S. 490, 100 S.Ct. 755, 62 L.Ed.2d 689 [1980].

[3] Norfolk & Western Railway Co. v. Liepelt, supra note 2, 444 U.S. at 492-493, 100 S.Ct. at 757.

[4] Norfolk & Western Railway Co. v. Liepelt, supra note 2, 444 U.S. at 492-493, 100 S.Ct. at 757; Michigan Central R. Co. v. Vreeland, 227 U.S. 59, 33 S.Ct. 192, 194, 57 L.Ed. 417 [1913].

The threshhold question here is whether *Liepelt* requires that we apply its teaching to a case tried and terminated before the pronouncement of the new rule. The Court's opinion did not explicitly state that it was to have retroactive effect.

Although *Liepelt's* effect does remain somewhat unsettled, the Court's subsequent decision in *Gulf Offshore Co.* v. *Mobil Oil Corp.*[5] gives a rather clear indication that *Liepelt's* retroactivity is indeed likely. We assume here that *Liepelt* does govern cases tried before its pronouncement. But this does not mean that *Liepelt* requires a reversal in every such case if *no* instruction was given advising the jury that damages for loss of future wages are not subject to federal income taxation. Rather, with respect to pre-*Liepelt* trials the record should first be examined to ascertain whether the jury was indeed under a misapprehension of the tax laws' impact on its verdict. A great disparity between the evidence and the verdict would be a sure indication of a jury's misconception.

In this appeal we undertake the examination *sua sponte*, mindful as we are that the defendant did not have a fair and full opportunity to raise the issue in its post-trial motions.[6]

The purpose of the *Liepelt* holding was to eliminate from the process of jury deliberation "an area of doubt or speculation that might have an improper impact on the computation of damages."[7] The economist in *Liepelt* testified to lost earnings of $302,000.00. The jury awarded the

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[5] 453 U.S. 473, 486-487, 101 S.Ct. 2870, 2879, 69 L.Ed.2d 784, 796-797 [1981], footnote 16.

[6] The Railroad's motion for new trial did not contain an allegation of error based on the *Liepelt* rationale. Its amended motion, which included this allegation of error, was not timely brought.

[7] Norfolk & Western Railway Co. v. Liepelt, supra note 3, 444 U.S. at 498, 100 S.Ct. at 759-760.

the plantiff $775,000.00. In the present case the employee pressed a claim for lost wages as well as for pain and suffering. The undisputed testimony of an economist placed his lost future earnings in 1980 dollars at between $649,-853.00 and $737,897.00. The jury's total award was $475,-000.00.

Because no disparity is present here between the employee's evidence and the award allowed him and there is hence no indication that the jury had raised the award in a mistaken belief that its verdict would be subject to income tax liability, we hold that the trial court's pre-*Liepelt* refusal to give the now-required nontaxability instruction does not afford a ground for reversal.

II.

The Railroad also complains that the trial court erred in failing to sustain its demurrer to the evidence. This error was not raised in the motion for new trial. It appears for the first time in the petition-in-error. The law is well settled that if a motion for new trial is filed and denied, the movant may not, on appeal, allege error which, though available to him at the time his motion was filed, was not asserted therein.[8] Railroad's failure to do so places the issue beyond the reach of our review.

III.

The Railroad also submits that the trial court erred in failing to sever from the merits stage of the trial the preliminary issue of whether the employee could avoid the binding effect of his prior settlement release.

A trial court may order a separate trial of any issue upon proper motion by a party,[9] but it is not required to

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[8] 12 O.S. 1981 § 991(b); Poteete v. MFA Mutual Insurance Company, Okl., 527 P.2d 18, 22 [1974]; Davis v. Sams, Okl., 542 P.2d 943 [1975]; Neel v. Board of County Commissioners of Cherokee County, Okl., 617 P.2d 201, 203 [1980].

[9] 12 O.S. 1981 § 243; 12 O.S. 1981 § 323.

do so. Only where there is a clear abuse of discretion will this court disturb a decision made on this point.

The burden rests on the Railroad to show that under the circumstances of this trial the court's failure to sustain its request for bifurcation resulted in prejudice and detriment. The Railroad's argument here, while most certainly appealing to a sense of orderly procedure, does not justify reversal. Nor does it counsel the imposition of a *per se* rule requiring bifurcation in every case. Bifurcation is more wisely to be confined to the special circumstances found to be present in a litigated case.

IV.

Lastly, the Railroad contends that the trial judge committed reversible error when he ruled that an early psychological evaluation of the employee could not be used in cross-examining the employee's psychologist.

At the time Railroad's medical exhibits were offered in evidence, employee's counsel did not object to the evaluation's admission in evidence. When Railroad's counsel attempted to use the evaluation in cross-examining employee's psychologist, employee's counsel objected to the use of the evaluation. The trial judge ruled that the evaluation was "prejudicial" and directed that it may not be used in cross-examination.

The employee's evaluation under consideration — the Minnesota Multiphasic Personality Inventory [MMPI test] — was carried out in 1975. The test was taken shortly after his initial x-ray examination failed to turn up any indication of a back injury. The result of the test in question was believed to indicate that the employee was exhibiting schizophrenic tendencies and may have been malingering. After he was readmitted for treatment a second time, another x-ray was taken of the employee's back. This time it revealed a herinated disc. Immediate surgery followed. Employee's medical witness testified in unequivocal terms

that the first x-ray did in fact reveal a herniated disc but its presence, no doubt, went undetected by the reviewing physician.

Approximately five years after the disc surgery, the employee underwent a series of three psychological tests. One of these measured depression, the second personality [the MMPI test] and the third measured sociopathy. On the basis of these tests, the psychologist found that the employee was in a state of emotional incapacitation by stress from constant pain from his injuries. The psychologist further testified that as long as the pain was present the worker's emotional and mental problems would continue.

The Railroad sought to impeach the psychologist's testimony by the first (1975) MMPI test.

Generally, any matter is a proper subject of cross-examination which is within the scope of direct examination, is material or relevant thereto and which tends to explain, contradict or discredit the witness's testimony. But a witness may not be impeached by reference to some collateral, irrelevant or immaterial matter.[10]

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[10]Under pre-Code case law, both civil and criminal, evidence which is not relevant to the issues in the case may be excluded. See Cox v. Sarkeys, Okl., 304, P.2d 979, 984 [1956] and Davis v. State, 30 Okl.Cr. 61, 234 P. 787, 790 [1925].

Pertinent Evidence Code sections, 12 O.S. 1981 §§ 2401 and 2402, provide:

§ 2401. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

§ 2402. "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Oklahoma, by statute or by this Code. Evidence which is not relevant is not admissible."

The earlier MMPI evaluation in question was conducted at a point in time when the real source of the employee's physical problems had not yet been either diagnosed or reached for effective treatment. The test — although similar to one of the three on which the employee's psychologist based his testimony — was conducted by another person under vastly different conditions some five years earlier. It had then been given for the purpose of ascertaining the employee's state of mind at that particular point in time. The result of the 1975 MMPI test cannot be said to bear any relevancy upon the later-conducted evaluation which was made in conjunction with other tests and the psychologist's personal observations. The Railroad's offer of proof provides here absolutely *no* clue as to relevancy. It is devoid of *any* indication of what the Railroad proposed to show by inquiring, on cross-examination, into the older MMPI evaluation. If indeed there was errer in precluding inquiry on cross-examination into the prior evaluation with a facially doubtful relevance to the psychologist's direct testimony, it was at best harmless. 12 O.S. 1981 § 2104 (A) (2).[11]

The extent of cross-examination is largely in the discretion of the trial court. Absent an abuse of that discretion to the manifest prejudice of the complaining party, judgment will not be reversed on the grounds that cross-examination was either improperly restricted or enlarged.[12] A party has no right to cross-examine except as to facts and

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[11]The terms of 12 O.S. 1981 § 2104(A)(2) provide in pertinent part:

"A. Error may not be predicated upon a ruling which admits or excludes evidence *unless a substantial right of a party is affected,* and: * * *

2. If the ruling is one excluding evidence, the substance of the evidence was made known to the judge by offer or was apparent from the context within which questions were asked. * * *" [Emphasis added].

[12]Lyday v. Holloway, Okl., 325 P.2d 432, 433 [1958].

circumstances connected with a witness's testimony on his direct examination. It is not improper to restrict the cross-examination that is sought to be extended to facts that are remote or disconnected from matters inquired into on direct examination.[13]

The trial court's judgment is free from error of law. It is accordingly, affirmed.

IRWIN, HODGES, LAVENDER and HARGRAVE, JJ., concur.

SIMMS, V.C.J., concurs in result.

BARNES, C.J., and DOOLIN, J., concur in Parts I, II and III and dissent from Part IV.

WILSON, J., concurs in part and dissents in part.

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[13]Guess v. Miner, 130 Okl. 93, 265 P. 633, 634 [1928].

APPENDIX B

[Filed March 25, 1983]

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

ELDON FAULKENBERRY, Appellee,	)	
v.	)	
	)	No. 55,005
THE KANSAS CITY SOUTHERN RAILWAY COMPANY, a corporation, Appellant.	)	

PETITION FOR REHEARING

COMES NOW the defendant, THE KANSAS CITY SOUTHERN RAILWAY COMPANY, and for its petition for rehearing submits the following:

PROPOSITION I

THE COURT'S RULING AS TO SECTION I IS CONTRA TO FEDERAL LAW

The Court stated in its Opinion dated March 15, 1983, that the case of *Norfolk & Western Railway Company* v. *Liepelt*, 445 U.S. 972, 100 S.Ct. 1667 (1980) controlled and was applicable to this case. However, the Court stated that *Liepelt*, supra, did not mandate a reversal in every case. The Court alluded to an economist's testimony and stated that the award was less than the economist's projection of future loss of earnings, therefore, defendant was not prejudiced.

It must be pointed out that the defendant/appellant contested each and every point of damages in the extent of disability that the plaintiff/appellee alleged to have sustained. The economist which this Court alluded to, and his figures, which were quoted by this Court, was the projected loss of income from the railroad only. Three medical doctors testified, and all three testified that the plaintiff/appel-

lee could work with some physical restrictions, and therefore, the figures quoted by this Court are totally misleading. Dr. John Wideman, a neurosurgeon from Fort Smith, Arkansas, stated that this man was employable with restrictions (Tr. 463). Dr. William Lockhart, another neurosurgeon from Fort Smith, Arkansas, testified that this man was able to work (Tr. 523). Therefore, the figures quoted in the Opinion are *totally misleading* as to the import of the decision in *Liepelt*, supra. The jury may well have thought that the man was re-employable and able to work, but that he would lose money. The verdict may well represent a figure of that difference of pay and an additional amount to cover *income taxes.*

The decision in Liepelt, supra, is not permissive, it is mandatory. The Court specifically states:

> "We hold that it was error to refuse the requested instructions in this case. That the instruction was brief and could be easily understood. It would not complicate the trial by making additional qualifying or supplemental instructions necessary. It would not be prejudicial to either party but would merely eliminate an area of doubt or speculation that might have had an improper impact on the computation of the amount of damages.
>
> "The judgment is reversed and the case is remanded to the appellate court of Illinois for further proceedings not inconsistent with this opinion." *Liepelt*, supra.

The United States Supreme Court at Page 497 of the Opinion rightfully notes that we live in a very tax conscious society and that it permeates the consideration of payment in nearly every manner. This Court, through merely quoting an improperly supported conclusion of an expert, says that this defendant was not prejudiced when the United States Supreme Court say that it was.

PROPOSITION II
IT WAS REVERSIBLE ERROR NOT TO ALLOW CROSS-EXAMINATION OF A PRIOR ADMITTED DOCUMENT.

In Section IV of the Court's Opinion the author states:

> "The railroad's offer of proof provides here absolutely *no* clue as to relevancy." *Faulkenberry* v. *K.C.S.*, 54 OBAJ 711.

The railroad submitted in its prior Brief and reiterates today that nothing could be more relevant than a person taking the same test on two different occasions with *absolutely, totally and completely different results.* The Court may note that there could be points of rehabilitation to be done by the plaintiff's attorney, but that does not go to relevancy — only to credibility.

Defendant/appellant would submit that the initial test was much more relevant than the evidence of second injury to the release and the alleged error of failure to bifurcate this case.

The Court states that the earlier test was prejudicial. *All evidence is prejudicial.* Evidence is presented to be prejudicial to each party's behalf. It is the jury's job to determine the credibility of the evidence and probative value, not the trial court's speculation that something has no probative value. The prior test would not have inflamed the jury, it had no gory or theatrical purpose; it was simply a document that showed the supposed test of the expert witness on the stand was invalid, contrary to prior testing, and maybe not entirely accurate. To hold that the prior test was irrelevant and that its exclusion was not prejudicial it [*sic*] to change the meaning of relevancy.

One of the most common and widely used methods of cross-examining an expert witness is to challenge the basis for his opinions. Those bases often include tests admini-

stered or performed by the expert witness. If a prior test is totally inconsistent with that, the expert's opinion is obviously placed in question.

CONCLUSION

While not specifically addressed in this petition, the defendant/appellant also challenges the assertions set forth in Sections II and III of the Opinion and respectfully submits that this matter should be reheard, reconsidered, and the prior Opinion withdrawn, and this case remanded for new trial on all issues before the District Court of LeFlore County.

Respectfully submitted,

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By (s) *Richard L. Keirsey*
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[Certificate of Mailing omitted this printing]

APPENDIX C

[Proffered Instruction not given by court]

You are instructed if you find from all the evidence in this case that plaintiff should be awarded damages against the defendant, plaintiff would not be required to pay any State or Federal income taxes on such award, if any is made.

Given

Refused

Excepted to by defendant

Exception allowed

.....

Judge

APPENDIX D

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

[Filed April 25, 1983]

Monday, April 25, 1983

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

* * * *

55,005 Eldon Faulkenberry v. The Kansas City Southern Railway Company, a corp.

Rehearing denied.

CONCUR: Simms, V.C.J., Irwin, Hodges, Lavender, Hargrave, Opala, JJ.

DISSENT: Barnes, C.J., Doolin, Wilson, JJ.

* * * *

Office-Supreme Court, U.S.
FILED
AUG 15 1983
ALEXANDER L. STEVAS,
CLERK

NO. 83-117

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1983

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, a corporation,

Petitioner,

VS.

ELDON FAULKENBERRY,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State of Oklahoma

BRIEF OF RESPONDENT ELDON FAULKENBERRY IN OPPOSITION TO PETITION FOR CERTIORARI

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OF COUNSEL

August, 1983

QUESTION PRESENTED FOR REVIEW

Liepelt, infra, requires in all FELA cases a jury must be instructed, when requested, that any award the jury might make to the plaintiff is not subject to income taxes.

Ten days prior to *Liepelt,* an Oklahoma state trial court, relying on a previous decision of the Supreme Court of Oklahoma, refused to give such an instruction, although requested to do so by petitioner.

On appeal from judgment rendered on the jury verdict, the Supreme Court of Oklahoma, relying upon *Gulf Offshore,* infra, held that *Liepelt* was probably retroactive in application, and it was error on the part of the trial court to refuse the instruction, but, in the light of the facts and circumstances of the particular case, the error was not prejudicial.

The question presented for review is whether the Supreme Court of Oklahoma was within its prerogative when that court made its finding of no demonstrated prejudice in the trial court's refusal to give the requested instruction.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINION BELOW 1

JURISDICTION 1

STATUTES INVOLVED 2

STATEMENT OF CASE 2

SUMMARY OF ARGUMENT 2

ARGUMENT 3

CONCLUSION 5

CERTIFICATE OF SERVICE 6

TABLE OF AUTHORITIES

CASES: Page

Chicago, Rock Island & Pacific Rwy. Co. v. Kinsey, Okl. 372 P.2d 863 (1962) 3

Dunn v. St. Louis-San Francisco Rwy. Co., 621 S.W.2d 245 (Mo. banc 1981), *cert. denied*, 454 U.S. 1145, 102 S.Ct. 1007, 71 L.Ed. 2d 298 (1982) 3

Flanigan v. Burlington Northern, Inc., 632 F.2d 880, (CA 8 1980), *cert. denied*, 450 U.S. 921, 101 S.Ct. 1370, 67 L.Ed. 2d 349 (1981) 4

Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 101 S.Ct. 2870, 69 L.Ed. 2d 784 (1981) 3

Ingle v. Illinois Central Gulf R. Co., 608 S.W.2d 76, (Mo. App. 1980), *cert. denied*, 450 U.S. 916, 101 S.Ct. 1359, 67 L.Ed. 2d 341 (1981) 3

Norfolk & Western Rwy. Co. v. Liepelt, 444 U.S. 490, 100 S.Ct. 755, 62 L.Ed. 2d 689 (1980) 3

Ybarra v. Burlington Northern, Inc., 689 F.2d 147 (CA 8 1982) 5

UNITED STATES STATUTES

28 USC §1254(1) 1

28 USC §1257(3) 1

45 USC §§51 et seq. 2

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---

BRIEF OF RESPONDENT ELDON FAULKENBERRY IN OPPOSITION TO PETITION FOR CERTIORARI

OPINION BELOW

The opinion of the Supreme Court of Oklahoma is reproduced as Appendix "A" to the petition and is reported at Okl, 661 P.2d 510 (1983).

JURISDICTION

The petition does not cite the correct jurisdictional statute. The petition cites 28 USC §1254(1) as invoking this court's jurisdiction. The applicable jurisdictional statute is 28 USC §1257(3), which covers writs of certiorari from the highest courts of a state. This statute, coupled with the fact

this is a Federal Employers' Liability Act (45 USC §§51, et seq.) case, gives this court jurisdiction to entertain the petition.

STATUTES INVOLVED

This is an FELA case, 45 USC §§51, et seq.

STATEMENT OF CASE

The facts necessary for a determination of the question presented are set forth in the opinion of the Supreme Court of Oklahoma found at Appendix "A" of the petition. Petitioner's factual allegation found at page 2 of the petition, to the effect that its motion for new trial alleged petitioner was entitled to a new trial because of the trial court's refusal to give the proffered instruction, is an untrue statement of fact. Petitioner did not timely allege the error in the trial court in its motion for new trial. See footnote 6 of the opinion of the Supreme Court of Oklahoma at Appendix "A" of the petition. The Supreme Court of Oklahoma, examined the question herein involved *sua sponte*.

SUMMARY OF ARGUMENT

1. Under Gulf Offshore, infra, once the Supreme Court of Oklahoma made the determination that **Liepelt** was to be applied as retroactive to pre-**Liepelt** trials, then that court was required to go the next step and determine if the error was prejudicial.
2. It did so and found no prejudice.
3. That finding settled the question.

ARGUMENT

The Oklahoma trial court instructed the jury in this case on February 8, 1980. On that date, had the trial judge given the requested instruction, the trial judge would have committed error under Oklahoma law. See *Chicago, Rock Island, & Pacific Rwy. Co. v. Kinsey,* Okla. 372 P.2d 863 (1962).

Ten days later on February 19, 1980, this court rendered its opinion in *Norfolk & Western Rwy Co. v. Liepelt,* 444 U.S. 490, 100 S.Ct. 755, 62 L.Ed. 2d 689 (1980). The second prong of *Liepelt*[1] requires in FELA cases the jury be instructed any award the jury might make the plaintiff is not subject to income taxes.

Until *Gulf Offshore Co. v. Mobil Oil Corp.,* 453 U.S. 473, 101 S.Ct. 2870, 69 L.Ed. 2d 784 (1981), decided by this court July 1, 1981, what appeared as a plausible argument could be made that *Liepelt* was to be prospective and not retroactive. For instance, please see *Ingle v. Illinois Central Gulf R. Co.,* 608 S.W.2d 76, (Mo. App. 1980), *cert. denied,* 450 U.S. 916, 101 S.Ct. 1359, 67 L.Ed. 2d 341 (1981); *Dunn v. St. Louis-San Francisco Rwy. Co.,* 621 S.W.2d 245 (Mo. banc 1981), *cert. denied,* 454 U.S. 1145, 102 S.Ct. 1007, 71 L.Ed. 2d 298 (1982).

Gulf Offshore at footnote 16 put to rest, for all practical purposes, the question of the prospective or retroactive effect of *Liepelt,* notwithstanding the rationale of *Ingle.*

The Supreme Court of Oklahoma in the opinion under review on the basis of *Gulf Offshore,* held *Liepelt* retroac-

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[1]The first point of **Liepelt** is not involved herein.

tive and, further, that it was error for the trial judge not to have given the requested instruction.

Under *Gulf Offshore,* however, that did not end the matter. Once the Supreme Court of Oklahoma had determined it was error not to have given the instruction, then the court was required to go to the next step and determine if the failure to give the instruction was *prejudicial* error. This step was necessary because, in remanding *Gulf Offshore* back to the Texas court, the Supreme Court of the United States with specific reference to the question of the instruction in a pre-*Liepelt* trial, issued its directive in the following language from the last sentence of *Gulf Offshore.* That sentence reads:

> "If the court decides that it was error to refuse the instruction, it may then address respondent's argument that the petitioner was not prejudiced by the error."

This is precisely what the Supreme Court of Oklahoma did in the opinion under review.[2] The court found the failure to give the instruction on the part of the trial court not prejudicial to the petitioner and affirmed the judgment.

For an identical situation involving FELA, a pre-*Liepelt* trial, *Liepelt,* and harmless error, please see *Flanigan v. Burlington Northern, Inc.,* 632 F.2d 880 (CA 8 1980), *cert. denied,* 450 U.S. 921, 101 S.Ct. 1370, 67 L.Ed. 2d 349 (1981).

The opinion of the Supreme Court of Oklahoma sets out ample facts to support the finding by that court of no

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[2]The nine member court was unanimous in its opinion as to the **Liepelt** point and two other points involved in the appeal. The court divided on a point not herein involved.

prejudice to the petitioner resulting from the trial court's failure to give the instruction.

It is fair to say the petition under consideration simply does not address the issue involved. Further, with all due respect, the authority cited in the petition is somewhat perplexing. The case of *Ybarra v. Burlington Northern, Inc.*, 689 F.2d 147 (CA 8 1982), at page 7, is a post-*Liepelt* case in which the *Liepelt* instruction was given. Under the same point, the petition refers to what would appear to be, perhaps, a decision from the Court of Appeals for the Tenth Circuit, but the petition does not disclose either the style of the case or a citation where it may be found in the reports.

CONCLUSION

There being nothing shown that would warrant review by this court the petition for certiorari should be denied.

Respectfully submitted,

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OF COUNSEL

CERTIFICATE OF SERVICE

I, Robert S. Blatt, a member of the Bar of this Court, and counsel of record for Eldon Faulkenberry, the respondent herein, hereby certify that:

(1) All parties required to be served in this proceeding have been served;

(2) Three (3) copies of the foregoing brief of respondent Eldon Faulkenberry, in opposition to petition for certiorari were served on counsel of record for petitioner in this proceeding at his post office address, as follows: Mr. Richard L. Keirsey, Esq., of Looney, Nichols, Johnson & Hayes, P.O. Box 468, Oklahoma City, Oklahoma 73101;

(3) Service on such party was made on the 12th day of August, 1983, by depositing said copies of this brief of respondent Eldon Faulkenberry in opposition to petition for certiorari, in a United States Post Office, First Class postage, fully prepaid, and addressed to the above named counsel.

/s/ Robert S. Blatt